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UNITED STATES V. BLAGOJEVICH: A STANDARD BAIT AND SWITCH

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INTRODUCTION

"How do you all like your first year of law school?" asked the man with the perfectly groomed hair. The response from the students at Chicago-Kent College of Law was mixed: some smiled, others shrugged, and the rest were too mesmerized by the hair and shiny suit to respond. "Well, I didn't do so great in law school, but look at me now; I'm the Governor of Illinois."

Less than four months after that brief visit to Chicago-Kent, news of the Governor's arrest was splashed across headlines throughout Illinois, the United States, and even the world: "Illinois Gov. Rod Blagojevich arrested on federal charges."[1]

Not surprisingly, Blagojevich's arrest, impeachment, and subsequent removal from office—most notably for his attempt to sell President Barack Obama's vacated United States Senate seat—

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[1] *See, e.g.*, Jeff Coen, *Illinois Gov. Rod Blagojevich Arrested on Federal Charges*, THE CHICAGO TRIBUNE (Dec. 10, 2008), http://www.chicagotribune.com/news/politics/obama/chi-blagojevich-1210,0,7494354.story; *Illinois Governor Arrested on Corruption Charges*, EURONEWS (Sept. 12, 2008), http://www.euronews.net/2008/12/09/illinois-governor-arrested-on-corruption-charges/.

garnered massive amounts of attention from the public and the media.[2] For those interested in following his downfall and subsequent expulsion from public office, there was a nearly endless stream of sources from which to obtain information, including online sources such as blogs,[3] Twitter,[4] and Facebook.[5] Even those members of the public who wished to avoid the media frenzy surrounding Rod Blagojevich were hard-pressed to avoid daily updates; this was especially true when Blagojevich's federal trial date was announced.[6]

Following the announcement of the trial date, the District Court for the Northern District of Illinois (Judge James B. Zagel presiding) began to receive e-mails and letters from members of the general public containing advice as to how he should rule.[7] In light of the great public interest surrounding the trial, Judge Zagel stated in a public status hearing that he had "given some consideration to public anonymity of the jurors at [least] until the trial is over."[8] Judge Zagel considered deferring disclosure of the jurors' names in order to prevent members of the public from contacting the jurors.[9]

On May 17, 2010, Judge Zagel held an informal and off-the-record meeting with members of the media to discuss his intention to keep the names of the jurors anonymous until a verdict was

[2] *See, e.g.*, Ray Long, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed From Office*, THE CHICAGO TRIBUNE (Jan. 30, 2009), http://www.chicagotribune.com/news/local/chi-blagojevich-impeachment-removal,0,5791846.story?page=2.

[3] *See, e.g.*, Natasha Korecki, THE BLAGO BLOG, http://blogs.suntimes.com/blago/ (last visited Nov. 1, 2010).

[4] http://twitter.com/governorrod.

[5] http://www.facebook.com/pages/Rod-Blagojevich/9367545725.

[6] *See Blagojevich Trial Date Set for June 3, 2010*, FOX NEWS (June 25, 2009), http://www.foxnews.com/politics/2009/06/25/blagojevich-trial-date-set-june/.

[7] Brief and Short Appendix of Intervenor-Appellants at 6, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).

[8] Brief & Appendix of the United States at 4, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).

[9] *Id.*

rendered.[10] Two weeks after this meeting and two days before jury selection was set to begin, *The Chicago Tribune*, *The New York Times*, and three media groups (hereinafter "Press Intervenors") filed a motion to intervene and for immediate public access to the names of jurors.[11] The Press Intervenors brought this motion in order to object to an anonymous jury.[12] The Press Intervenors were interested in publishing human-interest stories and determining whether the jurors were "suitable decision-makers."[13]

Before holding a hearing on the Press Intervenors' motion, Judge Zagel assured the potential jurors that their names would not be disclosed until the conclusion of the trial.[14] Judge Zagel then held a hearing and denied the Press Intervenors' motion on the basis that it was untimely and there was "a legitimate reason for sealing the names during trial."[15] Judge Zagel anticipated "that the substantial attention being devoted to the criminal charges against a former Governor of Illinois would lead the press and public to bombard jurors with email and instant messages that could undermine their impartiality (and perhaps their equanimity)."[16] Further bolstering Judge Zagel's decision was the fear that public knowledge of the jurors' identities "would discourage others from agreeing to serve in future trials."[17] It is important to note, however, that the parties and their counsel would be given access to the names of the jurors; Judge Zagel's ruling related only to the delayed release of the jurors' names to the public.[18]

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[10] *Id.* at *5.

[11] Press Intervenors' Motion to Intervene and for Immediate Public Access to Names of Jurors at 1, United States v. Blagojevich, 2010 WL 2934476 (N.D. Ill. July 26, 2010) (No. 08 CR 888).

[12] *Id*.

[13] United States v. Blagojevich (*Blagojevich I*), 612 F.3d 558, 561 (7th Cir. 2010).

[14] Brief & Appendix of the United States, *supra* note 8, at 8.

[15] Brief and Short Appendix of Intervenor-Appellants, *supra* note 7, at 4–5.

[16] *Blagojevich I*, 612 F.3d at 559.

[17] *Id.* at 562.

[18] *Id*. at 559.

Determined to obtain the jurors' names, the Press Intervenors appealed to the Seventh Circuit, contending that the press has an unqualified right of access to jurors' names under the First Amendment.[19] The Seventh Circuit did not agree that the press has an unqualified right of access to the names;[20] instead, the court stated that there is a rebuttable presumption in favor of disclosure of jurors' names.[21] In its analysis of whether this presumption had been rebutted, the Seventh Circuit explicitly refused to rely on the First Amendment; instead, the court used statutes and the common law.[22] Importantly, the First Amendment, common law, and statutory law each carries its own *distinct* standard by which the presumption can be rebutted.[23] Notably, the First Amendment standard carries a more rigorous burden for rebutting the presumption than the common law and statutory standards.[24] However, instead of applying the common law and statutory standards to its common law and statutory analysis, the Seventh Circuit applied the more rigorous First Amendment standard to its analysis.[25] Ultimately, the court held that the presumption in favor of disclosure had not been rebutted.[26] The court vacated Judge Zagel's deferred-disclosure order and remanded the case with instructions to grant the Motion to Intervene and hold proceedings consistent with its opinion.[27]

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[19] *Id.* at 561.

[20] *Id.*

[21] *Id.* at 563.

[22] *Id.*

[23] *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–78 (statutory standard); Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty. (*Press-Enterprise I*), 464 U.S. 501 (1984) (First Amendment standard); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (common law standard); United States District Court for the Northern District of Illinois, *Plan for Random Selection of Jurors* (Dec. 2006), http://www.ilnd.uscourts.gov/press/ILNDJuryPlan.pdf (statutory standard).

[24] *See Rushford*, 846 F.2d at 253.

[25] *Blagojevich I*, 612 F.3d at 564.

[26] *Id.* at 563.

[27] *Id.*

This Note considers whether the Seventh Circuit applied the correct standard when it analyzed the issue of whether the jurors' names should be kept from the public until verdict was rendered in Blagojevich's case. Part I of this Note provides a background as to when jurors' names can be withheld from the public. Part II provides a background of the Seventh Circuit case, *United States v. Blagojevich.* Part III argues that the panel incorrectly applied a First Amendment standard to its common law and statutory analysis of whether the jurors' names should be kept secret, and thereby erased the distinction among First Amendment, common law, and statutory analyses of this issue in the Seventh Circuit. Finally, Part IV argues that this distinction should be revived because if a court is unable to use the common law standard—which carries a lower burden than the First Amendment standard—in the future, it may result in the release of jurors' names when they otherwise would have been protected from the public and the media.

I. PUBLIC ACCESS TO JURORS' NAMES PRIOR TO VERDICT IS NOT AN ABSOLUTE RIGHT

A. A Presumption of Openness

In the United States of America, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[28] This presumption stems in part from the fact that "[o]ur system of jurisprudence abhors the ancient star chamber inquisitions," in which accused Englishmen were subjected to secret trials and deprived of their rights.[29] Consequently, the presumption of openness extends to most aspects of a criminal trial, including the identities of jurors.[30] This presumption of openness with regard to jurors' identities

[28] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

[29] Commonwealth v. Swinehart, 664 A.2d 957, 967 (Pa. 1995).

[30] *Blagojevich I*, 612 F.3d at 563. Presumption of openness also extends to: voir dire, *Press-Enterprise I*, 464 U.S. 501 (1984); preliminary hearings, Press-Enter. Co. v. Super. Ct. of Cal for Cnty. of Riverside (*Press-Enterprise II*), 478 U.S.

stems from three distinct sources: (1) The First Amendment, (2) common law, and (3) and statutory law.

In *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), the Supreme Court created the Experience and Logic Test[31] in order "[t]o determine what aspects of a criminal trial are subject to a presumptive right of public access under the First Amendment."[32] The Experience and Logic Test requires courts to evaluate two complementary considerations to determine whether information is subject to the right of access.[33] The "experience" prong is used to determine "whether the place and process have historically been open to the press and general public," and the "logic" prong is used to consider "whether public access plays a significant positive role in the functioning of the particular process in question."[34] In *United States v. Wecht*, the Third Circuit employed the Experience and Logic Test and concluded that there is a presumptive First Amendment right of access to jurors' identities.[35] Notably, in *United States v. Blagojevich*, the Seventh Circuit explicitly refused to rely "on the [F]irst [A]mendment as the means of obtaining the [juror] information."[36] Instead, the Seventh Circuit relied on the two other sources mentioned above: the common law and statutes.[37]

In *Nixon v. Warner Communications, Inc.*, the Supreme Court stated that there is a "common-law right of access to judicial records."[38] The "long-recognized presumption in favor of public access to judicial records" gives the public the right "to monitor the functioning of our courts, thereby insuring quality, honesty and respect

1 (1986); judicial records, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978); and the criminal trial itself, *Richmond Newspapers*, 448 U.S. 555.

[31] 478 U.S. at 9.

[32] United States v. Wecht, 537 F.3d 222, 234 (3d Cir. 2008).

[33] *Press-Enterprise II*, 478 U.S. at 8.

[34] *Id.*

[35] 537 F.3d at 239.

[36] *Blagojevich I*, 612 F.3d 558, 563 (7th Cir. 2010).

[37] *Id.*

[38] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

for our legal system."[39] This right of access includes a right to inspect and copy both public and judicial records and documents.[40] This right has also been extended to include the disclosure of juror names; for example, in *United States v. Blagojevich*, the Seventh Circuit found that the presumption in favor of disclosure of jurors' names finds its roots in the common-law tradition of open litigation.[41]

In addition, the presumption in favor of disclosure of jurors' names can stem from the Jury Selection and Service Act, which provides that each plan for jury selection must "fix the time when the names drawn from the qualified jury wheel shall be disclosed to the parties *and to the public*."[42] As acknowledged by the Seventh Circuit, "[t]he answers 'never' or 'after trial' are possible under this language but constitute an exception to the norm of disclosure, an exception that needs justification."[43]

Importantly, the presumption that jurors' names will be disclosed under any one of these three sources is not absolute.[44] Each source carries its own distinct standard by which the presumption of openness can be rebutted.[45]

1. First Amendment Standard

A district court can attempt to rebut the presumption in favor of disclosure using a First Amendment standard. The controlling standard

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[39] *In re* Continental Ill. Sec. Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984).

[40] *Nixon*, 435 U.S. at 597.

[41] *Blagojevich I*, 612 F.3d at 563.

[42] Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(b)(7) (emphasis added).

[43] *Blagojevich I*, 612 F.3d at 563.

[44] *Id.* at 561.

[45] *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–78 (statutory standard); *Press-Enterprise I*, 464 U.S. 501 (1984) (First Amendment standard); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (common law standard); United States District Court for the Northern District of Illinois, *Plan for Random Selection of Jurors* (Dec. 2006), http://www.ilnd.uscourts.gov/press/ILNDJuryPlan.pdf (statutory standard).

is found in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), a case in which the Supreme Court found that the First Amendment makes the jury selection process presumptively open to the public.[46] As stated in *Press-Enterprise I*, under the First Amendment:

> The presumption of openness may be overcome only by an *overriding* interest based on findings that closure is essential to preserve higher values and is *narrowly tailored* to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[47]

The Supreme Court reiterated this standard in *Waller v. Georgia*, where the Court held that the closure of a suppression hearing over the objections of the accused must meet the standards set out in *Press-Enterprise I*:

> Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[48]

The First Amendment standard was also applied in the context of juror name disclosure in *United States v. Wecht*.[49] In *Wecht*, the Third Circuit held that there is a presumptive First Amendment right of access to obtain the names of both trial jurors and prospective jurors

[46] 464 U.S. 501.
[47] *Id.* at 510 (emphasis added).
[48] 467 U.S. 39, 48 (1984).
[49] 537 F.3d 222 (3d Cir. 2008).

prior to empanelment of the jury, and that the district court failed to rebut this presumption under the First Amendment standard.[50]

2. Common Law Standard

Instead of using a First Amendment standard, a district court can attempt to rebut the presumption in favor of disclosure via a common law standard. As stated in *Rushford v. New Yorker Magazine, Inc.*, the presumption of access "can be rebutted if *countervailing* interests heavily outweigh the public interests in access."[51] Additionally, the trial court may weigh "the interests advanced by the parties in light of the public interests and the duty of the courts."[52]

A comparison of the common law standard against the First Amendment standard makes it clear that "[t]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment."[53] While the common law simply calls for "countervailing interests,"[54] the First Amendment requires an "overriding interest."[55] Furthermore, while the First Amendment requires that closure be "narrowly tailored,"[56] the common law only requires a weighing of countervailing interests to determine if they heavily outweigh the presumption of access.[57]

The ability of a court to rebut this presumption under the common law finds its roots in the court's inherent power to control the proceedings in front of it.[58] This implied judicial power is "governed

[50] *Id.* at 240 (finding that the district court's reasons for rebutting the presumption were "conclusory and generic" and lacked the specificity required by the First Amendment standard).

[51] Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (emphasis added).

[52] *Id.* (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978)).

[53] *Id.*

[54] *Id.*

[55] *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

[56] *Id.*

[57] *Rushford*, 846 F.2d at 253.

[58] *See generally* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[59] According to Ballentine's Law Dictionary, "inherent power" is defined as:

> A power essential to the very existence of the court or its ability to function in dispensing justice . . . A power included within the scope of a court's jurisdiction which a court possesses irrespective of specific grant by constitution or legislation; a power which can neither be taken away nor abridged by the legislature.[60]

In the context of disclosure of juror names, some courts have concluded that a trial court's inherent power to control courtroom proceedings includes the power to control the release of juror names.[61] In *Gannet Co. v. State*, the court stated: "Indeed other courts have noted that the theory of the jury at common law supports an historical tradition of judicial discretion as to disclosure of juror names."[62] Similarly, Judge Posner argued in his dissent from the denial of rehearing en banc of *United States v. Blagojevich* that the question of whether to release juror names "call[s] for an exercise of judgment" on the part of the trial judge, based on the judge's experience and common sense.[63]

Furthermore, in the context of high-publicity cases, the Supreme Court has acknowledged the right of a trial court to manage the courtroom and courthouse premises, and even restrict the release of information by counsel, witnesses, newspeople, and court staff.[64] In *Sheppard v. Maxwell*, the Supreme Court recognized the

[59] *Id.* at 43.

[60] BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[61] Gannett Co. v. State, 571 A.2d 735, 746 (Del. 1989).

[62] *Id.*

[63] United States v. Blagojevich (*Blagojevich II*), 614 F.3d 287, 290 (7th Cir. 2010) (Posner, J., dissenting).

[64] Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

"pervasiveness of modern communications" and the potentially prejudicial impact that it can have on jurors.[65] In light of this fact, the court stated that trial judges must use their power to "ensure that the balance is never weighed against the accused."[66] The court further advised that "the cure lies in those remedial measures that will prevent the prejudice at its inception";[67] one such remedial measure is deferring disclosure of jurors' names before trial because it cuts off the possibility of prejudicial impact.

3. Statutory Standard

Instead of using the First Amendment or the common law, a district court can also attempt to rebut the presumption in favor of disclosure by using a statutory standard. The Jury Selection and Service Act provides express statutory authority to abridge the presumption in favor of disclosure "if the interests of justice so require."[68]

The Jury Selection and Service Act requires each district court to adopt a jury-selection plan, which must:

> [F]ix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, *to keep these names confidential in any case where the interests of justice so require*.[69]

[65] *Id.* at 362.

[66] *Id.*

[67] *Id.* at 363.

[68] Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–78; *see* United States District Court for the Northern District of Illinois, *Plan for Random Selection of Jurors* (Dec. 2006), http://www.ilnd.uscourts.gov/press/ILNDJuryPlan.pdf.

[69] 28 U.S.C. § 1863(b)(7) (emphasis added).

This section of the Act—particularly the sentence on "the interests of justice"—gives district courts discretion to overcome the presumption of openness and withhold juror names from the public.[70] According to the Act's legislative history, the Act "permits the present diversity of practice to continue. Some district courts keep juror names confidential for fear of jury tampering. Other district courts routinely publicize the names."[71] If a trial court withholds juror information under the Jury Selection and Service Act, a showing of arbitrariness is required to reverse the decision.[72]

In addition, the Jury Selection and Service Plan adopted by the United States District Court for the Northern District of Illinois states that:

> No person shall make public or disclose to any person, unless so ordered by a judge of this Court, the names drawn from the Qualified Jury Wheel to serve in this Court until the first day of the jurors' term of service. *Any judge of this Court may order that the names of jurors involved in a trial presided over by that judge remain confidential if the interests of justice so require*.[73]

This plan, like the Jury Selection and Service Act, provides that a judge may keep juror names confidential "if the interests of justice so require."[74] Relying on the Supreme Court's reasoning in *Nixon v. Warner Communications* that "the decision as to access is one best left to the sound discretion of the trial court," Judge Posner argued that the

[70] United States v. Black, 483 F. Supp. 2d 618, 625 (N.D. Ill. 2007).

[71] *Blagojevich II*, 614 F.3d 287, 297 (7th Cir. 2010) (citing H.R. REP. No. 1076, at 11 (1968)).

[72] United States v. Tucker, 526 F.2d 279, 283 (5th Cir. 1976).

[73] United States District Court for the Northern District of Illinois, *Plan for Random Selection of Jurors* (Dec. 2006), http://www.ilnd.uscourts.gov/press/ILNDJuryPlan.pdf (emphasis added).

[74] *Id.*

plan does not require the judge to hold a hearing to determine whether the names of jurors shall remain confidential.[75]

4. Anonymity, Deferred-Disclosure, Sequestration, Special Instruction

If a court is successful in overcoming the presumption of openness using one of the three standards above, the court can then use an anonymous jury,[76] deferred-disclosure,[77] sequestration, or special instruction to keep the jurors' names from the public.[78]

When a judge decides to withhold indentifying information regarding jurors—particularly their names—the jury is considered an "anonymous jury."[79] With a full-fledged anonymous jury, the jurors' names will never be revealed to the public; on the other hand, when a judge decides to temporarily withhold the names of the jurors, the term used is "deferred-disclosure."[80]

As an alternative to anonymity or deferred-disclosure, a judge can make a special instruction to the jury to prevent any risks associated with disclosure.[81] For example, a judge can "instruct jurors not to answer calls, listen to voice mails, or open e-mails and letters from numbers and addresses they do not recognize."[82] Finally, the most extreme option for keeping jurors out of the public eye is called "sequestration"; if a judge sequesters a jury, the jurors will be isolated from members of the general public during trial.[83]

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[75] *Blagojevich II*, 614 F.3d at 297 (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978)).

[76] *See* United States v. Crockett, 979 F.2d 1204, 1217 (7th Cir. 1992).

[77] *See* United States v. Black, 483 F. Supp. 2d 618, 625 (N.D. Ill. 2007).

[78] United States v. Blagojevich (*Blagojevich III*), No. 08 CR 888-1, 6, 2010 WL 2934476, at *6 (N.D. Ill. July 26, 2010).

[79] United States v. Crockett, 979 F.2d 1204, 1215 (7th Cir. 1992).

[80] United States v. Black, 483 F. Supp. 2d 618, 625 (N.D. Ill. 2007).

[81] *Blagojevich III*, 2010 WL 2934476, at *9.

[82] *Id.*

[83] *Blagojevich II*, 614 F.3d 287, 289 (7th Cir. 2010).

5. Reasons for Restricting Access to Jurors' Names

In most cases, the parties and the public know the names and other identifying information of jurors.[84] However, in certain criminal trials, "special precautions must be taken in order to protect jurors from harassment, intimidation, anxiety, and a host of other disruptive influences."[85] Indeed, as stated in *United States v. Ochoa-Vasquez*,

> [S]ome combination of the following factors may support the empanelment of an anonymous jury: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[86]

In *Ochoa-Vasquez*, the court held that all five factors were present.[87] The defendant was linked "to an organized criminal organization with a history of violence and obstruction of justice," he faced a lengthy sentence if convicted, and "his prior connections to [a Colombian drug] cartel promised to make [it] a high-profile trial."[88] While the use of an anonymous jury typically arises in an organized crime trial like *Ochoa-Vasquez*, where juror safety or intimidation is a primary concern, it can also be useful in the context of high-profile cases.[89]

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[84] United States v. Crockett, 979 F.2d 1204, 1215 (7th Cir. 1992).

[85] *Id.* at 1215 n.10.

[86] 428 F.3d 1015, 1034 (11th Cir. 2005).

[87] *Id.* at 1034.

[88] *Id.* at 1034–35.

[89] *See* United States v. Edwards, 303 F.3d 606, 613 (5th Cir. 2002).

For instance, *Sheppard v. Maxwell* was a high-profile case in which the defendant was a young doctor who was accused of bludgeoning his pregnant wife to death.[90] The trial attracted a "swarm" of reporters, photographers, and television and radio personnel,[91] leading the Supreme Court to comment that the publicity created a "carnival atmosphere."[92] In *Sheppard*, the Supreme Court addressed the question of whether the defendant "was deprived of a fair trial . . . because of the trial judge's failure to protect [him] sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution."[93] In answering this question in the affirmative, the Supreme Court was concerned not only with the defendant's due process rights, but with the jurors' privacy rights as well.[94] The Court stated:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[95]

Due to advances in technology, the pervasiveness of modern communications that the Supreme Court was concerned about when *Sheppard* was decided in 1966 has only increased since that time.[96] As a result, some courts have taken strong measures, including the

[90] 384 U.S. 333, 335 (1966).
[91] *Id.* at 339.
[92] *Id.* at 357.
[93] *Id.* at 335.
[94] *Id.* at 353–62.
[95] *Id.* at 362.
[96] *See id.*

empanelment of anonymous juries or deferred disclosure of jurors' names in high-profile cases.[97]

As noted above, in *Sheppard*, the Supreme Court was also concerned with protecting the jurors' privacy interests:

> [T]he jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.[98]

A judge can protect jurors' privacy interests from this type of publicity in high-profile trials by restricting access to the jurors' names and other identifying information.[99] Without access to the jurors' names, the press will have a more difficult time "transform[ing] jurors' personal lives into public news."[100]

Support for the notion that some high-profile cases warrant restricting access to jurors' names can also be found in *United States v. Edwards*, decided by the Fifth Circuit in 2002.[101] *Edwards* is strikingly similar to the *Blagojevich* case: one of the defendants, a former Governor of the State of Louisiana, was convicted of exploiting his apparent ability to influence Louisiana's riverboat gambling license process.[102] The governor's trial attracted intense

[97] *See* United States v. Edwards, 303 F.3d 606 (5th Cir. 2002); United States v. Black, 483 F. Supp. 2d 618 (N.D. Ill. 2007); Gannett Co. v. State, 571 A.2d 735 (Del. 1989).

[98] *Sheppard*, 384 U.S. at 353 (citations omitted).

[99] *See Black*, 483 F. Supp. 2d 618.

[100] *Id.* at 630.

[101] *See* 303 F.3d 606 (5th Cir. 2002).

[102] *Id.* at 610.

media interest, involved a defendant who was a polarizing figure in Louisiana politics, and generated "highly charged emotional and political fervor."[103] While acknowledging that restricting access to juror information typically occurs in organized crime trials, the Fifth Circuit stated that this measure may be appropriate in a case that "attracts unusually large media attention and arouses deep passions in the community."[104] The Fifth Circuit thus held that the district court's decision to withhold juror information was appropriate in this high-profile case.[105]

II. *UNITED STATES V. BLAGOJEVICH*

A. Factual Background

Former Governor Rod Blagojevich was arrested on federal corruption charges on December 9, 2008.[106] The charges alleged that he conspired to sell President Barack Obama's vacated United States Senate seat, engaged in "pay-to-play" schemes, and misused state funding to fire *Chicago Tribune* editorial writers.[107]

The Illinois House of Representatives impeached Blagojevich by a 114–1 vote on January 8, 2009.[108] This was the first time in Illinois' "190-year history that a governor has been impeached."[109] In late

[103] *Id.* at 614.

[104] *Id.* at 613.

[105] *Id.* at 617.

[106] *Illinois Gov. Rod R. Blagojevich and His Chief of Staff John Harris Arrested on Federal Corruption Charges*, DEPARTMENT OF JUSTICE PRESS RELEASE (Dec. 9, 2008), http://chicago.fbi.gov/dojpressrel/pressrel08/dec09_08.htm.

[107] *Id.*

[108] Ray Long & Rick Pearson, *House Votes to Impeach Blagojevich*, THE CHICAGO TRIBUNE (Jan. 9, 2009), http://newsblogs.chicagotribune.com/clout_st/2009/01/live-blog-of-il.html.

[109] *Id.*

January, 2009, Blagojevich went on a media blitz proclaiming his innocence, going so far as to schedule eleven interviews in one day.[110] On January 29, 2009, the Illinois Senate removed Blagojevich from office by a 59–0 vote, convicting him on an article of impeachment.[111] The Senate also voted 59–0 to bar Blagojevich from ever holding public office again in the State of Illinois.[112]

United States district Judge James Zagel set a trial date for June 3, 2010.[113] While Blagojevich was ultimately convicted by a federal jury on one count of lying to the FBI, his conviction is not the focus of this Note.[114] Instead, this Note will focus on the events leading up to the start of Blagojevich's federal trial—specifically, the hearings and meetings held by Judge Zagel relating to the issue of disclosure of the names of the jurors who would ultimately decide Blagojevich's fate.

B. Press Intervenors' Argument

On June 1, 2010, the Press Intervenors moved to intervene and for immediate public access to the names of the jurors.[115] The Press Intervenors made this motion for the limited purpose of objecting to an

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[110] Alex Koppelman, *Rod Blagojevich Has Only Just Begun to Fight*, THE SALON (Jan 27, 2009), http://www.salon.com/news/politics/war_room/2009/01/27/blago/index.html.

[111] Malcolm Gay & Susan Saulny, *Blagojevich Ousted by Illinois State Senate*, THE NEW YORK TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/30illinois.html.

[112] *Id.*

[113] Jeff Coen, *Corruption Trial for Blagojevich Set for June 3, 2010*, CHICAGO BREAKING NEWS CENTER (June 25, 2009), http://www.chicagobreakingnews.com/2009/06/corruption-trial-for-blagojevich-set-for-june-3.html.

[114] Jeff Coen, John Chase, Bob Secter, Stacy St. Clair & Kristen Mack, *Guilty on Just 1 Count, Blago Taunts U.S. Attorney*, CHICAGO BREAKING NEWS CENTER (Aug. 17, 2010), http://www.chicagobreakingnews.com/2010/08/14th-day-for-blagojevich-jury.html. The jury deadlocked on the other twenty-three counts against Blagojevich, and a mistrial was ordered on those counts. *Id.* A new trial is set to take place 2011 on those remaining counts. *Id.*

[115] Press Intervenors' Motion to Intervene and for Immediate Public Access to Names of Jurors, *supra* note 11, at 1.

anonymous jury and seeking immediate public access to the jurors' names.[116] In their motion, the Press Intervenors argued that there was no valid reason to keep the jurors' names anonymous and that sealing the names would be contrary to the tradition of open trials and right of access guaranteed by the First Amendment and the common law.[117]

The Press Intervenors argued that juror names are presumptively open to the public absent extraordinary circumstances and that this presumption of access is mandated by both the First Amendment and common law.[118] In support of their argument, the Press Intervenors reasoned that "[k]nowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice."[119] The Press Intervenors also argued that Judge Zagel's concern—"that revealing jurors' names in a high-profile case would tempt 'bloggers' to contact them during trial"—could be eliminated by the tools that the court has at its disposal.[120]

The Press Intervenors then argued that the Experience and Logic Test from *Press-Enterprises II* confirms that the constitutional right of access has specific application to juror names.[121] Analyzing the "experience" prong, the Press Intervenors cited three cases suggesting that there has been a well-established tradition of access to juror names.[122] Analyzing the "logic" prong, the Press Intervenors cited three additional cases suggesting that public access to juror names "plays a significant and positive role" because it allows the public to verify the impartiality of jurors and educates the public on the judicial system.[123]

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[116] *Id.*

[117] *Id.* at 2.

[118] Memorandum in Support of Press Intervenors' Motion to Intervene and for Immediate Public Access to Names of Jurors at 1, United States v. Blagojevich, 2010 WL 2934476 (N.D. Ill. 2010) (No. 08 CR 888).

[119] *Id.* at 2 (citing United States v. Wecht, 537 F.3d 222 (3d Cir. 2008)).

[120] *Id.*

[121] *Id.* at 4.

[122] *Id.* at 5.

[123] *Id.* at 6 (citing *In re* Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990)).

The Press Intervenors then argued that, in Blagojevich's case, there was no justification for an anonymous jury that could overcome the constitutional presumption of openness.[124] The Press Intervenors argued that the presumption had not been overcome because neither the court nor the parties had shown "any threats, jury tampering or 'other evils affecting the administration of justice' that justify withholding jurors' identities from the media."[125] Rather, the Press Intervenors argued that the "heavy, First Amendment-freighted burden cannot be sustained by a generalized belief that it would be better for jurors to remain anonymous, lest they be beset by bloggers."[126]

Finally, the Press Intervenors attached an affidavit of Matt O'Connor, a *Chicago Tribune* editor, in support of their motion. In the affidavit, Matt O'Connor stated that based on his personal experience and research there is a tradition of openness in the jury selection process which includes public access to the jurors' names in high profile cases.[127] While stating that the rare exceptions to public access typically involve cases where jury safety is at issue, he acknowledged that there have also been "notable exceptions" in high-profile cases such as the trial of Conrad Black.[128]

C. District Court's Hearing on Press Intervenors' Motion

On June 3, 2010, Judge Zagel held a hearing on the Press Intervenors' motion.[129] The motion was denied for the reasons stated

[124] *Id.* at 8.

[125] *Id.*

[126] *Id.* at 10.

[127] Affidavit of Matt O'Connor in Support of Motion to Intervene and for Immediate Public Access to Names of Jurors at 2, United States v. Blagojevich, 2010 WL 2934476 (N.D. Ill. 2010) (No. 08 CR 888).

[128] *Id.* at 3; *see* United States v. Black, 483 F. Supp. 2d 618, 620 (N.D. Ill. 2007) (denying motion to disclose final jury list for the case of Conrad Black, a Canadian businessman whose trial for fraud "generated intense international media interest").

[129] Notification of Docket Entry at 1, United States v. Cellini (N.D. Ill. June 3, 2010) (No. 08 CR 888).

in open court.[130] Displeased with Judge Zagel's denial of their motion, the Press Intervenors appealed to the United States Court of Appeals for the Seventh Circuit.[131] However, before analyzing the appeal, it is important to understand why Judge Zagel denied the Press Intervenors' motion; a portion of Judge Zagel's reasoning is revealed in the Press Intervenors' appellate brief.[132]

As described in the Press Intervenors' appellate brief, Judge Zagel began the hearing by addressing the timeliness of the Press Intervenors' motion to intervene. Judge Zagel stated that the Press Intervenors' motion was "untimely" and should have been filed much earlier.[133] Importantly, Judge Zagel ruled that even if the Press Intervenors' motion were timely, he would still deny the motion on the merits, because he "concluded that there was a legitimate reason for sealing the names during trial."[134]

Judge Zagel stated that the *Blagojevich* case was "different" because it had attracted "enormous public attention, an enormous expression of views."[135] Judge Zagel was also concerned about improper contact with jurors by "bloggers" and others via the Internet: "[I]t strikes me that there has been extraordinary attention paid to this case, that [leads] not only to the expression of opinions, but to people seeing an opportunity to get noticed, and one way to get yourself noticed is to do something in connection with this particular case."[136] Judge Zagel was also concerned with the fact that members of the public can use e-mail to communicate secretly with jurors, and stated that this must be avoided.[137]

Importantly, the Press Intervenors acknowledged that Judge Zagel's concerns were not merely hypothetical because he had

[130] *Id.*
[131] Brief and Short Appendix of Intervenor-Appellants, *supra* note 7, at 1.
[132] *See id.* at 4–6.
[133] *Id.* at 4.
[134] *Id.* at 4–5.
[135] *Id.* at 5.
[136] *Id.*
[137] *Id*. at 5–6.

received e-mails and letters from members of the public containing advice as to how he should rule.[138] Furthermore, although the Press Intervenors argued that Judge Zagel rejected out of hand the alternatives to juror anonymity that they suggested, they acknowledged that Judge Zagel thought it would be unfair to prohibit members of the jury from reading unsolicited e-mails.[139]

D. Government's Argument

The Government provided two arguments in its appellate brief. First, the Government argued that it was not an abuse of discretion to deem the motion to intervene untimely.[140] The Government noted that a full year before trial, the Press Intervenors were on notice that Judge Zagel was considering deferring disclosure of juror names.[141] Instead of intervening then, the Press Intervenors waited "until the eve of trial."[142] Furthermore, once Judge Zagel definitively decided to defer disclosure, the Press Intervenors waited two weeks to move to intervene, and noticed their motion for hearing "on the very day jury selection was set to begin."[143] The Government argued that the "appellants' delays deprived the district court and the parties of an opportunity for due deliberation," which justified Judge Zagel's decision to deny the Press Intervenors' motion.[144] Further bolstering the Government's argument was the fact that Judge Zagel already told the jurors that they would not be identified by name.[145]

Second, the Government argued that it was not an abuse of discretion for Judge Zagel to defer disclosure of the jurors' names to

[138] *Id*. at 6.
[139] *Id.*
[140] Brief & Appendix of the United States, *supra* note 8, at 12.
[141] *Id*.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 8.

the public until verdict.[146] The Government argued that the Press Intervenors "failed to establish that access to juror names prior to verdict is a right guaranteed to them by the First Amendment or the common law, rather than a matter of discretion traditionally and appropriately vested in the district court."[147] The Government argued that even if a qualified right to juror names prior to verdict exists, the circumstances of this case—including the "unprecedented" amount of public attention and substantial risk that "seated jurors would become the targets of unsolicited, and presumptively prejudicial, contacts"—warranted deferred disclosure.[148]

Like the Press Intervenors, the Government embarked on an analysis of the Experience and Logic Test to determine if the First Amendment provides a qualified right of access to juror names.[149] Based on an analysis of statutes and case law, the Government concluded that it did not.[150] The Government concluded by requesting that the Seventh Circuit affirm Judge Zagel's denial of the Press Intervenors' motion to intervene.[151]

E. The Seventh Circuit's Opinion

Chief Judge Easterbrook wrote the Seventh Circuit opinion, which was issued on July 2, 2010.[152] That same day, a member of the court asked for a vote on whether to rehear the case en banc.[153] "After the

[146] *Id.* at 13.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 19.

[150] *Id.* at 20.

[151] *Id.* at 40. In their reply brief, the Press Intervenors criticized the Government's brief as "reflect[ing] a cramped conception of the press's and public's right of access to criminal proceedings that is fundamentally at odds with the Supreme Court's First Amendment jurisprudence." Reply Brief of Intervenor-Appellants at 1, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).

[152] *Blagojevich I*, 612 F.3d 558, 558 (7th Cir. 2010).

[153] *Blagojevich II*, 614 F.3d 287, 287 (7th Cir. 2010).

judges exchanged comments, but before the voting on whether to grant rehearing en banc was complete, the panel decided to alter its opinion to meet some of the concerns expressed in the exchange of comments."[154] Ultimately, a majority of the judges voted against hearing the appeal en banc.[155]

On July 12, 2010, the panel issued its amended opinion,[156] which is the subject of this section. In the amended opinion, the Seventh Circuit held that the motion to intervene was timely[157] and that the presumption in favor of disclosure of jurors' names had not been rebutted.[158] The Seventh Circuit vacated Judge Zagel's deferred-disclosure order and remanded the case with instructions to grant the motion to intervene and hold proceedings consistent with its opinion.[159]

The panel began by addressing the timeliness of the motion to intervene and concluded that it was an abuse of discretion to deem the motion untimely.[160] While the panel acknowledged that Judge Zagel had assured the jurors that their names would not be revealed during trial, the panel correctly stated that this assurance occurred *after* the motion to intervene had been filed.[161] As a result, the court refused to make Judge Zagel's "declaration a self-fulfilling prophecy."[162] The panel acknowledged that the Press Intervenors were adequately notified that Judge Zagel was considering deferred-disclosure of juror names in mid-2009, and that they had to recognize that it was a possibility in this case because "[t]wo years earlier a district judge had deferred the release of jurors' names in another high-profile criminal

[154] *Id*. at 288 (Posner, J., dissenting).
[155] *Id.* at 287 (majority opinion).
[156] *Blagojevich I*, 612 F.3d at 561 (7th Cir. 2010).
[157] *Id.*
[158] *Id.* at 563.
[159] *Id.* at 565.
[160] *Id.* at 560.
[161] *See id.*
[162] *Id.*

prosecution in the Northern District of Illinois."[163] However, the panel stated that Judge Zagel likely would have rejected a motion to intervene in mid-2009 as "premature."[164] The panel ultimately held that the Press Intervenors' motion to intervene was not untimely as "[t]here was never a public announcement identifying an issue and specifying a schedule for its resolution."[165]

The panel then proceeded to address the merits of the appeal. The panel rejected the Press Intervenors' contention that the press has an unqualified right of access to jurors' names during trial, stating that "no one contends (or should contend) that jurors' names *always* must be released."[166] Rather, the panel was concerned with the justification behind a judge's decision to defer release of jurors' names—or to not release them at all.[167] The panel acknowledged that Judge Zagel had a legitimate interest in deferring disclosure and that the Press Intervenors had a legitimate interest in requesting that the names be released.[168]

Although the panel accepted that both sides had legitimate interests in this matter, it refused to analyze the matter through the lens of the First Amendment, as the Press Intervenors and Government had in their briefs.[169] The court gave three main reasons for this refusal: (1) "there is no general constitutional 'right of access' to information that a governmental official knows but has not released to the public,"[170] (2) the jurors' names were not revealed during voir dire "not because of the judge's decision but because of § 10(a) of the district court's plan for implementing the Jury Selection and Service

[163] *Id.* (citing United States v. Black, 483 F. Supp. 2d 618, 625 (N.D. Ill. 2007)).

[164] *Id.* at 560–61.

[165] *Id.* at 561.

[166] *Id.* (emphasis in original).

[167] *Id.*

[168] *Id.* at 562.

[169] *Id.* at 563

[170] *Id.* at 562.

Act,"[171] and (3) "[a] court should never begin with the Constitution."[172] Rather than use the First Amendment, the panel analyzed this matter via statutes and the common law, arguing that the public has a common-law right of access to information that affects the resolution of federal suits.[173]

The panel derived a presumption in favor of disclosure of juror names from both the common law tradition of open litigation and the Jury Selection and Service Act.[174] The panel also provided a standard for rebutting this presumption, which was stated in the opinion as follows:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[175]

The panel determined that under this standard, the presumption in favor of disclosure of jurors' names had not been overcome because Judge Zagel did not make any findings of fact and did not provide an opportunity to present evidence.[176] Furthermore, the panel argued that this presumption was not rebutted because "no evidence was taken, no argument entertained, no alternatives considered, and no findings made before this decision was announced to the jurors."[177] The panel also analyzed the language of the Jury Selection and Service Act and the jury plan adopted by the Northern District of Illinois, and asserted

[171] *Id.* at 562–63.

[172] *Id.* at 563.

[173] *Id.*

[174] *Id.* at 563–64; *see* 28 U.S.C. §§ 1861–78 (2006).

[175] *Blagojevich I*, 612 F.3d at 564 (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).

[176] *Id.* at 563.

[177] *Id.* at 564.

that any exceptions to the norm of disclosure required "justification" and "some procedure to make the necessary finding."[178]

Notably, however, the panel stated that the justification required for deferred disclosure of juror names is less than the justification required for empanelling an anonymous jury.[179] Furthermore, the panel determined that the evidence a judge must consider "depends on what the parties submit."[180] Indeed, the panel cited to *United States v. Black*, in which the parties presented no evidence, and the court decided whether the jurors' names should be disclosed based on "the parties' arguments and the judge's experience with jurors' concerns and behavior."[181] In comparison, the court stated that Judge Zagel "has referred elliptically to efforts to contact him by email and in other ways" and suggested that Judge Zagel put details on the record to help demonstrate some of the potential effects of releasing the jurors' names.[182]

Ultimately, the court stated that "[w]hat is essential—what occurred in *Black* but not so far in this case—is an opportunity for the parties (including the intervenors) to make their views known in detail, followed by a considered decision that includes an explanation why alternatives to delayed release of the jurors' names would be unsatisfactory."[183] Rather than deciding outright when it is appropriate to delay the release of jurors' names, the Seventh Circuit required a new, and more complete, hearing.[184] The court remanded the case with instructions to grant the motion to intervene and to hold a hearing consistent with its opinion.[185]

[178] *Id.*
[179] *Id.*
[180] *Id.* at 565.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*

F. Judge Posner's Dissent

Although Judge Posner's dissent is from the denial of rehearing en banc, the crux of his analysis focuses on Judge Easterbrook's opinion and Judge Zagel's decision to defer disclosure of the jurors' names.[186]

Judge Posner began by endorsing Judge Zagel's handling of this matter: "An experienced trial judge made a reasonable determination that the release of jurors' names before the end of trial would expose the jurors to the widespread mischief that is a daily if not hourly occurrence on the Internet."[187] Judge Posner reiterated the important fact that the jury was not anonymous; rather, the parties knew the jurors' names, and the public would know them after the trial ended.[188] Judge Posner argued that in light of this fact, and "[g]iven the extremely high profile of this case nationwide as well as in Illinois, and the unusual attention-getting conduct of the principal defendant and his wife, there is no good argument for releasing the jurors' names before the trial ends."[189]

Next, Judge Posner criticized the panel's decision for not recognizing how serious the repercussions could be if Judge Zagel were forced to renege on his promise to defer release of juror names.[190] Though the panel acknowledged that it would be "regrettable to disappoint jurors' legitimate expectations,"[191] it failed to recognize that "jurors may well be upset, concerned for their privacy, fearful of the prospect of harassment . . . and angry at having been induced by false pretenses to agree to take months out of their life to perform jury service."[192]

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[186] *See generally Blagojevich II*, 614 F.3d 287, 288–97 (7th Cir. 2010) (Posner, J., dissenting).

[187] *Id.* at 287.

[188] *Id.*

[189] *Id.* at 287–88.

[190] *Id.* at 288.

[191] *See Blagojevich I*, 612 F.3d 558, 560 (7th Cir. 2010).

[192] *Blagojevich II*, 614 F.3d at 288 (Posner, J., dissenting).

Judge Posner then criticized the panel's argument that, unlike the parties in the *Black* case, the parties and intervenors here did not have an opportunity "to make their views known in detail."[193] Judge Posner argued that the parties and intervenors had this opportunity, but failed to present any evidence of consequence.[194] Indeed, he noted that Judge Zagel, unlike Judge St. Eve in *Black*, "actually had a bit of trial-type evidence before him," which was the affidavit from *The Chicago Tribune* editor.[195] Therefore, Judge Posner concluded that "the media *have* submitted evidence, that evidence was before Judge Zagel when he ruled, and the media do not argue that they were prevented from submitting more evidence."[196] He further argued that the media did not submit additional evidence because of their belief that the First Amendment gives them the right to the jurors' names unless there are threats made against the jurors.[197]

Judge Posner also criticized the panel's reliance on "trial-type" evidence, stating "trial-type evidence is neither required for, nor likely to be helpful in, the judge's exercise of discretion to withhold jurors' names from the public until the trial ends."[198] Rather, Judge Posner posited that a trial judge should decide whether to defer disclosure of juror names based on experience, common sense, and judgment.[199]

Next, Judge Posner argued that the jurors' interest in their privacy during a lengthy high-profile trial trumps the public's interest in learning the jurors' identities prior to verdict.[200] Importantly, Judge Posner did not have to address the parties' interests because Blagojevich did not object to Judge Zagel's deferred-disclosure order, and the Government's interest was in line with the jurors' interest.[201]

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[193] *Id.* at 290.
[194] *Id.*
[195] *Id.* at 294; *see supra* Part II.B. (describing affidavit in detail).
[196] *Blagojevich II*, 614 F.3d at 294 (Posner, J., dissenting).
[197] *Id.*
[198] *Id.* at 290.
[199] *Id*.
[200] *Id.* at 292.
[201] *Id*.

Citing to a number of law review articles, Judge Posner presented a number of benefits to juror anonymity; he also endorsed Judge St. Eve's approach in *United States v. Black*:

> In a case like this that has garnered intense national and international media attention, releasing juror names during the pendency of trial threatens the integrity of the jurors' ability to absorb the evidence and later to render a verdict based only on that evidence. This is the case because disclosure increases the risk of third-party contact by the press or by non-parties who are monitoring these proceedings through the vast media attention this case has gathered.[202]

Judge Posner opined that because the prosecution of Rod Blagojevich was of an even higher-profile than that of the defendant in *Black*, Judge Zagel's decision to defer disclosure should have been upheld without a new hearing.[203] Judge Posner then argued that the Press Intervenors' decision not to ask for a hearing was a forfeiture that the court neglected to enforce.[204] He noted that the Press Intervenors did not ask for a hearing in their motion to intervene or in their appellate briefs.[205] Rather, they simply asked for the jurors' names in the district court, and asked that Judge Zagel be ordered to release the names on appeal.[206]

Finally, Judge Posner criticized the panel for "overrul[ing] Judge St. Eve's sensible ruling rejecting any presumption in favor of disclosure of jurors' names before verdict."[207] Judge Posner was critical of the grounds on which the panel overruled Judge St. Eve—namely, the "common-law right of access by the public to information

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[202] *Id.* at 293 (citing United States v. Black, 483 F. Supp. 2d 618, 628 (N.D. Ill. 2007)).

[203] *Id.* at 295.

[204] *Id*.

[205] *Id.*

[206] *Id*.

[207] *Id*. at 296.

that affects the resolution of federal suits."[208] He rejected the notion that access to juror names falls within a presumption in favor of public access to judicial records based on the fact that jurors' names are not judicial records.[209] Furthermore, even assuming that there is a federal common-law right of access to juror names, Judge Posner argued that it has been supplanted by legislation—specifically, the Jury Selection and Service Act and the jury plan for the Northern District of Illinois.[210] Judge Posner argued that these two pieces of legislation allowed Judge Zagel to use his discretion and withhold juror names until verdict.[211]

III. ANALYSIS

In *United States v. Blagojevich*, the Seventh Circuit recognized three bases by which judicial proceeding information is made available to the press and public: (1) the First Amendment right of access,[212] (2) the common-law presumption of openness,[213] and (3) the Jury Selection and Service Act.[214] While each of these bases functions primarily to make information available to the press and public, each basis also carries its own *distinct* standard by which the presumption of openness can be rebutted.

Under the First Amendment, the presumption of openness can only be rebutted by an "overriding interest" with closure "narrowly tailored" to serve that interest.[215] Under the common law, the presumption of openness can be rebutted if "countervailing interests"

[208] *Id*.

[209] *Id*.

[210] *Id*. at 297; *see supra* Part I.A.

[211] *Blagojevich II*, 614 F.3d at 297 (Posner, J., dissenting).

[212] *See Press-Enterprise I*, 464 U.S. 501 (1984).

[213] *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

[214] Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–78.

[215] *Press-Enterprise I*, 464 U.S. at 510.

heavily outweigh the public interests;[216] furthermore, the trial court may weigh "the interests advanced by the parties in light of the public interest and the duty of the courts."[217] Notably, "[t]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment."[218] Finally, under the Jury Selection and Service Act, the presumption can be rebutted if the "interests of justice so require."[219]

The Seventh Circuit recognized the aforementioned distinctions and explicitly refused to use the First Amendment as a vehicle to analyze whether the district court had overcome the presumption in favor of disclosure of jurors' names.[220] Instead, the panel decided to use "statutes and the common law."[221] However, the panel failed to apply the appropriate standard when it analyzed the issue.[222] Rather than applying the common law and statutory standards to its common law and statutory analysis, the panel—without explanation or announcement—incorrectly applied the heavier-burdened First Amendment standard to its analysis.[223]

In its opinion, the Seventh Circuit, quoting *Waller v. Georgia*, applied the following standard to orders providing for anonymity of jurors:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternative to closing the

[216] *Rushford*, 846 F.2d at 253.
[217] *Id.* (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978)).
[218] *Id.*
[219] 28 U.S.C. § 1863(b)(7).
[220] *Blagojevich I*, 612 F.3d 558, 563 (7th Cir. 2010).
[221] *Id*.
[222] *Id.* at 564.
[223] *Id.*

> proceeding, and it must make findings adequate to support the closure.[224]

However, the Seventh Circuit did not quote the standard in full—it failed to include two crucial words: "Under *Press-Enterprise*."[225] The full quote from *Waller v. Georgia* reads as follows:

> Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternative to closing the proceeding, and it must make findings adequate to support the closure.[226]

Inclusion of the words "Under *Press-Enterprise*" is crucial because *Press-Enterprise*—as the Seventh Circuit explicitly acknowledged at the outset of its opinion—is a First Amendment case.[227] Without these words, it is not clear that a First Amendment standard is being applied; with them, the truth is revealed.

Therefore, it is clear that although the Seventh Circuit recognized a distinction among the First Amendment, common law, and statutory law, it effectively erased the distinction by applying a First Amendment standard to its analysis of statutory and common law. As a result of this opinion, there is serious question as to whether the distinction remains because the First Amendment standard is applied regardless of the basis by which the issue is analyzed. This distinction should be revived because if a court is unable to use the common law standard—which carries a lower burden than the First Amendment standard—in the future, it may result in the release of jurors' names

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[224] *Id.* (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)). The Seventh Circuit stated that this standard was "also true of orders providing for the anonymity of jurors." *Id.*

[225] *See Waller*, 467 U.S. at 48.

[226] *Id.*

[227] *See Blagojevich I*, 612 F.3d at 561.

when they otherwise would have been protected from the public and the media. Finally, it is clear that the Seventh Circuit has broken ranks by not maintaining the distinction among the First Amendment, common law, and statutory law. Other circuits have retained the aforementioned distinction, recognizing that a common law right of access analysis is distinct from the constitutional analysis in various contexts.[228]

IV. CONCLUSION

In *United States v. Blagojevich*, District Judge James Zagel recognized that the jurors' names should not be disclosed until the conclusion of the trial.[229] The Press Intervenors seeking access to these names appealed to the Seventh Circuit, claiming that "the press has an unqualified right of access to jurors' names while the trial proceeds."[230] This claim was based principally on two First Amendment cases, *Press-Enterprise Co. v. Superior Court*, and *United States v. Wecht*.[231]

On appeal, the Seventh Circuit explicitly refused to analyze the issue under the First Amendment, and instead decided to follow common law and statutory law.[232] However, the panel incorrectly

[228] *See, e.g.*, United States v. Wecht, 537 F.3d 222, 233 (3d Cir. 2008) (retained distinction in context of juror name disclosure); San Jose Mercury News, Inc. v. U.S. Dist. Ct.-N.D. (San Jose), 187 F.3d 1096, 1102 (9th Cir. 1999) (retained distinction in context of access to report); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (retained distinction in context of sealing court documents); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (retained distinction in context of disclosure of discovery documents).

[229] Brief and Short Appendix of Intervenor-Appellants, *supra* note 7, at 4–5.

[230] *Blagojevich I*, 612 F.3d at 561.

[231] *Id.*; *see Press-Enterprise I*, 464 U.S. 501, 510 (1984) (concluding that the First Amendment makes voir dire presumptively open to the public); United States v. Wecht, 537 F.3d 222, 234 (3d Cir. 2008) (extending this approach to jurors' names even when not mentioned during voir dire).

[232] *Blagojevich I*, 612 F.3d at 563. The Seventh Circuit made it clear that a judge could not make a decision to defer disclosure of jurors' names simply on the basis of inherent judicial power. *Id.* at 564.

applied a First Amendment standard to its common law and statutory analysis. Furthermore, the panel did so without stating that the genesis of the standard was First Amendment case law.

In its opinion, the panel established a distinction among First Amendment,[233] common law,[234] and statutory[235] analyses of rebutting the presumption of openness. However, the panel eliminated this distinction by applying a First Amendment standard to its common law and statutory analysis of whether jurors' names should be disclosed.[236] The panel incorrectly erased this historic distinction and thus created a significant risk for the future; it is now possible that a court will be unable to apply a common law standard, which may result in the improper release of jurors' names.[237]

[233] *See Press-Enterprise I*, 464 U.S. at 510.

[234] *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

[235] *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–78.

[236] *See Blagojevich I*, 612 F.3d at 564.

[237] *Id.* Ultimately, on remand, Judge Zagel made the correct decision to defer disclosure of jurors' names until the end of trial. *See Blagojevich III*, No. 08 CR 888-1, 6, 2010 WL 2934476, at *11 (N.D. Ill. July 26, 2010) However, he applied the wrong standard from the Seventh Circuit. *See id.* at *5.